

## **II. REMARKS**

### **A. Introduction**

The Office Action dated February 26, 1998 has been carefully reviewed and the foregoing amendments made in response thereto.

Claims 2 and 3 are amended. Claims 2-10 and 12-27 are pending in the application.

Claims 2-10 and 12-27 are rejected under judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 59 of 5,233,654, claim 29 of 5,335,277, claim 3 of 4,704,725, claim 25 of 4,965,825, claim 21 of 5,109,414, and claim 6 of 5,233,654.

Claims 2-10 and 12-27 are rejected under 35 U.S.C. § 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventors, at the time the application was filed, had possession of the claimed invention.

Claim 2 stands rejected under 35 U.S.C. § 102 (a) as being anticipated by WO81/2961 of Campbell, herinafter Campbell.

Claims 3-10 and 12-27 are rejected under 35 U.S.C. § 103 (a) as being unpatentable Campbell.

Claims 2-10 and 12-27 remain active in this application. No new matter is presented in the foregoing amendments. Approval and entry of same is respectfully requested.

### **B. Response to Requirement Imposed Upon Applicants to Resolve Alleged Conflicts Between Applicants' Applications.**

Applicants respectfully traverse the requirements of the Office Action paragraph 7.

Paragraph 7 of the Office Action requires Applicants to either:

- (1) file terminal disclaimers in each of the related 328 applications terminally disclaiming each of the other 327 applications; or
- (2) provide an affidavit attesting to the fact that all claims in the 328 applications have been reviewed by applicant and that no conflicting claims exist between the applications; or

(3) resolve all conflicts between claims in the related 328 applications by identifying how all the claims in the instant application are distinct and separate inventions from all the claims in the above identified 328 applications.

In addition, Examiner states that failure to comply with any one of these requirements will result in abandonment of the application.

Examiner states that the requirement has been made because conflicts exist between claims of the related co-pending applications, including the present application. Examiner sets forth only the serial numbers of the co-pending applications without an indication of which claims are conflicting. Examiner has also attached an Appendix providing what is deemed to be clear evidence that conflicting claims exist between the 328 related co-pending applications and the present application. Further, Examiner states that an analysis of all claims in the 328 related co-pending applications would be an extreme burden on the Office requiring millions of claim comparisons.

Applicants respectfully traverse these requirements in that Examiner has both improperly imposed the requirements, and has incorrectly indicated that abandonment will occur upon failure to comply with the requirement. Applicants' traversal is supported by the fact that 37 C.F.R. § 1.78 (b) does not, under the present circumstances, provide Examiner with authority to require Applicants to either: 1) file terminal disclaimers; 2) file an affidavit; or 3) resolve all apparent conflicts. Additionally, the penalty of abandonment of the instant application for failure to comply with the aforementioned requirement is improper for being outside the legitimate authority to impose abandonment upon an application. The following remarks in Section (B) will explain Applicants' basis for this traversal.

**1. The PTO's New Requirement is an Unlawfully  
Promulgated Substantive Rule Outside the  
Commissioner's Statutory Grant of Power**

The PTO Commissioner obtains his statutory rulemaking authority from the Congress through the provisions of Title 35 of the United States Code. The broadest grant of rulemaking

authority -- 35 U.S.C. § 6 (a) -- permits the Commissioner to promulgate regulations directed only to "the conduct of proceedings in the [PTO]". This provision does NOT grant the Commissioner authority to issue substantive rules of patent law. Animal Legal Defense Fund v. Quigg, 932 F.2d 920, 930, 18 USPQ2d 1677, 1686 (Fed. Cir. 1991).<sup>1</sup> Applicants respectfully submit that the Examiner's creation of a new set of requirements based upon 37 CFR § 1.78(b) constitutes an unlawful promulgation of a substantive rule in direct contradiction of a long-established statutory and regulatory scheme.

## **2. The PTO's Requirement is a Substantive Rule**

The first determination is whether the requirement as imposed by the PTO upon Applicants is substantive or a procedural rule. The Administrative Procedure Act offers general guidelines under which all administrative agencies must operate. A fundamental premise of administrative law is that administrative agencies must act solely within their statutory grant of power. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The PTO Commissioner has NOT been granted power to promulgate substantive rules of patent law. *Merck & Co., Inc. v. Kessler*, 80 F.3d 1543 (Fed. Cir. 1996), citing, *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 930, 18 USPQ2d 1677, 1686 (Fed. Cir. 1991).

The appropriate test for such a determination is an assessment of the rule's impact on the Applicants' rights and interests under the patent laws. *Fressola v. Manbeck*, 36 USPQ2d 1211, 1215 (D.D.C. 1995). As the PTO Commissioner has no power to promulgate substantive rules, the Commissioner receives no deference in his interpretation of the statutes and laws that give rise to the instant requirement. *Merck & Co., Inc. v. Kessler*, 80 F.3d 1543 (Fed. Cir. 1996), citing, *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). When agency rules either (a) depart from existing practice or (b) impact the substantive rights and interests of the

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<sup>1</sup> Accord *Hoechst Aktiengesellschaft v. Quigg*, 917 F.2d 522, 526, 16 USPQ2d 1549, 1552 (Fed. Cir. 1990); *Glaxo Operations UK Ltd. v. Quigg*, 894 F.2d 392, 398-99, 13 USPQ2d 1628, 1632-33 (Fed. Cir. 1990); *Ethicon Inc. v. Quigg*, 849 F.2d 1422, 1425, 7 USPQ2d 1152, 1154 (Fed. Cir. 1988).

effected party, the rule must be considered substantive. *Nat'l Ass'n of Home Health Agencies v. Scheiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983).

**a. The PTO Requirement is Substantive Because it Radically Changes Long Existing Patent Practice by Creating a New Requirement Upon Applicants Outside the Scope of 37 C.F.R. § 1.78 (b)**

The Examiner's requirement is totally distinguishable from the well articulated requirement authorized by 37 CFR § 1.78 (b), because it (1) creates and imposes a new requirement to avoid abandonment of the application based on the allegation that conflicts exist between claims of the related 328 co-pending applications, and (2) it results in an effective double patenting rejection without the PTO's affirmative double patenting rejection of the claims. Long existing patent practice recognizes only two types of double patenting, double patenting based on 35 U.S.C. § 101 (statutory double patenting) and double patenting analogous to 35 U.S.C. § 103 (the well-known obviousness type double patenting).<sup>2</sup> These two well established types of double patenting use an objective standard to determine when they are appropriate<sup>3</sup> and have a determinable result on the allowability of the pending claims.

The Examiner's new requirement represents a radical departure from long existing patent practice relevant to conflicting claims between co-pending applications of the same inventive entity. Two well established double patenting standards are based on an objective analysis of comparing pending and *allowed* claims. However, in the present application, there are no

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<sup>2</sup>MPEP § 804(B)(1) states, in an admittedly awkward fashion, that the inquiry for obviousness type double patenting is analogous to a rejection under 35 U.S.C. 103: "since the analysis employed in an obvious-type double patenting determination parallels the guidelines for a 35 U.S.C. 103 rejection, the factual inquiries set forth in Graham v. John Deere Co., 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103 are employed when making an obvious-type double patenting analysis".

<sup>3</sup> The objective test for same invention double patenting is whether one of the claims being compared could be literally infringed without literally infringing the other. The objective test for obviousness type double patenting is the same as the objective nonobviousness requirement of patentability with the difference that the disclosure of the first patent may not be used as prior art.

*allowed* claims. The Examiner's new requirement to avoid a double patenting rejection presumes that conflicts exist between claims in the present application and claims in the 327 copending applications. This presumption of conflicts between claims represents a radical departure from long existing patent practice as defined by 37 C.F.R. § 1.78 (b), which states:

Where two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in the absence of good and sufficient reason for their retention during pendency in more than one application.

Clearly, the only requirement authorized by the rule is the elimination of conflicting claims from all but one application where conflicting claims have been determined to exist. Furthermore, in order to determine that conflicting claims do in fact exist in multiple applications, the only possible analysis is obviousness-type double patenting, since there are no allowed or issued claims by which to employ the 35 U.S.C. § 101 statutory double patenting analysis. Once obviousness-type double patenting analysis has been applied and conflicting claims have been determined to exist, only a *provisional* obviousness-type double patenting rejection is possible until claims from one application are allowed.

In summary, the Examiner's new requirement departs from long-established practice because it (1) creates and imposes a new requirement to avoid abandonment of the application based on the allegation that conflicts exist between claims of the related 328 co-pending applications, and (2) it results in an effective double patenting rejection without the PTO's affirmative double patenting rejection of the claims.

Therefore, the Examiner's new requirement departs from existing practice and therefore is a **substantive rule** beyond the authority of the PTO and is therefore, invalid.

**b. The New Requirement is Also a Substantive Rule  
Because it Adversely Impacts the Rights and  
Interests of Applicants to Benefits of the Patent**

The rights and benefits of a U.S. patent is solely a statutory right. *Merck & Co., Inc. v. Kessler*, 80 F.3d 1543 (Fed. Cir. 1996). The essential statutory right in a patent is the right to exclude others from making, using and selling the claimed invention during the term of the

patent. Courts have recognized that sometimes new procedural rules of the PTO are actually substantive rules, e.g. when the new rule made a substantive difference in the ability of the applicant to claim his discovery. *Fressola v. Manbeck*, 36 USPQ2d 1211, 1214 (D.D.C. 1995) (emphasis added), citing, *In re Pilkington*, 411 F.2d 1345, 1349; 162 USPQ 145 (CCPA 1969); and *In re Steppan*, 394 F.2d 1013, 1019; 156 USPQ 143 (CCPA 1967).

The new requirement, on its face and as applied here, is an instance of a PTO rule making a substantive difference in Applicants' ability to claim their invention and, therefore, must be considered a substantive rule. The requirement denies Applicants rights and benefits expressly conferred by the patent statute. The measure of the value of these denied rights and benefits is that the requirement, as applied here, would deny Applicants the full and complete PTO examination of Applicants' claims on their merits, as specified by 37 C.F.R. § 1.105. In addition, to file terminal disclaimers in each of the related 328 applications terminally disclaiming each of the other 327 applications based on the PTO's incomplete examination on the merits would deny Applicants the benefit of the full patent term of 17 years on each of Applicants' respective applications. Applicants respectfully submit that the requirement has a huge impact on their rights and interests in the presently claimed invention.

**c. Conclusion: Substantive Rule**

In summary, the requirement is a change to long existing practice and/or has a substantive impact on the rights and interests of Applicants to their invention. Either finding means that the new requirement is a substantive rule. Since the Commissioner has no power to issue substantive rules, the requirement is an improperly promulgated substantive rule having no force of law.

**3. The PTO Requirement is Outside the Scope of 37 C.F.R. § 1.78 (b)**

Rule 78 (b) states that:

Where two or more applications filed by the same applicant contain conflicting claims, elimination of such claims from all but one application may be required in

the absence of good and sufficient reason for their retention during pendency in more than one application.

The only **requirement** that Rule 78 (b) authorizes is the elimination of conflicting claims from all but one co-pending applications.

In the instant Office Action, Examiner has not required the elimination of all conflicting claims from all but one application, but instead has required Applicants to: 1) file terminal disclaimers in each of the related 328 applications; 2) provide an affidavit; or 3) resolve all conflicts between claims in the related 328 applications. None of the options in the requirement is authorized by Rule 78 (b), and therefore Applicants respectfully submit that such a requirement is improper.

With respect to the PTO's authority to act within Rule 78 (b) regarding the rejection of conflicting claims, MPEP § 822.01 states that:

Under 37 CFR § 1.78 (b), the practice relative to overlapping claims in applications copending before the examiner..., is as follows: Where claims in one application are unpatentable over claims of another application of the same inventive entity because they recite the same invention, *a complete examination should be made of the claims of each application* and all appropriate rejections should be entered in each application, including rejections based upon prior art. *The claims of each application may also be rejected on the grounds of provisional double patenting on the claims of the other application* whether or not any claims avoid the prior art. Where appropriate, the same prior art may be relied upon in each of the applications. MPEP 822.01 (6th Ed., Rev. 3, 1997), (*emphasis added*).

In light of the requirement of the Office Action, MPEP § 822.01 and 37 CFR § 1.78 (b) are not applicable since there has not been any rejection with regard to the elimination of conflicting claims from all but one co-pending application.

**4. The Assertion That Failure to Comply with the Requirement Will Result in Abandonment of Applicants' Application is Improper**

Applicants' prospective failure to comply with the above requirements cannot properly result in abandonment of the present application. Applicants respectfully submit that abandonment of an application can properly occur only:

- (1) for failure to respond within a provided time period (under Rule 135);

- (2) as an express abandonment (under Rule 138); or
- (3) the result of failing to timely pay the issue fee (under Rule 316).

There is no provision in the rules permitting abandonment for failure to comply with any of the presented requirements. To impose an improper requirement upon Applicants and then hold the application is to be abandoned for failure to comply with the improper requirement violates the rules of practice before the USPTO. Furthermore, Examiner is in effect attempting to create a substantive rule which is above and beyond the rulemaking authority of the USPTO, and therefore is invalid.

In the *Application of Mott*, 539 F.2d 1291, 190 USPQ 536 (CCPA 1976), the applicant had conflicting claims in multiple applications. The CCPA held that action by the Examiner which would result in automatic abandonment of the application was legally untenable. *Id.* at 1296, 190 USPQ at 541. In the present application, Examiner has asserted that there are conflicting claims in multiple applications, and that non-compliance of the Office Action's requirement will result in an automatic abandonment. Therefore, under *Mott's* analysis, the Office Action's result of abandonment of Applicants' application is legally untenable.

#### **5. Response to Apparent Conflict of Claims**

Applicants submit that the presentation of the Office Action Appendix fails to demonstrate any conflicts between claims of the present application and claims of the co-pending applications. Rather, the Office Action Appendix compares representative claims of *other* applications in attempt to establish that "conflicting claims exist between the 328 related co-pending applications." Absent any evidence of conflicting claims between the Applicants' present application and any other of Applicants' co-pending applications, any requirement imposed upon Applicants to resolve such alleged conflicts is improper.

#### **6. Request for Withdrawal of Requirement**

Therefore, Applicants respectfully request that Examiner reconsider and withdraw the requirement that Applicants: (1) file terminal disclaimers in each of the related 328 applications



terminally disclaiming each of the other 327 applications; (2) provide an affidavit attesting to the fact that all claims in the 328 applications have been reviewed by applicant and that no conflicting claims exist between the applications; or (3) resolve all conflicts between claims in the above identified 328 applications by identifying how all the claims in the instant application are distinct and separate inventions from all the claims in the above identified 328 applications, which upon failing to do so will abandon the application.

#### **7. Filing of Supplemental Oath**

Notwithstanding the foregoing, Applicants will file a supplemental oath under 37 C.F.R. § 1.67 for each application when Examiner identifies allowable subject matter. Applicants respectfully propose that the filing of individual supplemental oaths attesting to the absence of claim conflicts between previously patented claims and subsequently allowed claims is a more reasonable method of ensuring the patentable distinctness of subsequently allowed claims.

Under 37 C.F.R. § 1.105, § 1.106 & § 1.78 (b), Examiner has the duty to make every applicable rejection, including double patenting rejection. Failure to make every proper rejection denies Applicants all rights and benefits related thereto, e.g., Applicants' right to appeal, etc. Once obviousness-type double patenting analysis has been applied and conflicting claims have been determined to exist, only a *provisional* obviousness-type double patenting rejection is possible until claims from one application are allowed.

#### **C. Information Disclosure Statement**

The Applicants appreciate the Examiner's review of the Information Disclosure Statements filed 12/4/95, 12/22/95, 2/6/96, and 4/7/97 and have addressed those specific concerns raised in paragraph 8 of the Office Action. It is the Applicants' understanding that the Examiner raised the following 5 issues:

- (1) the reasons for such a large number of references cited,
  - (2) foreign language references cited without a statement of relevance or translation
- have not been considered,

- (3) the relevancy of numerous references listed in the Information Disclosure Statements are subsequent to the Applicants' latest effective filing date of 9/11/87,
- (4) citation of references apparently unrelated to the subject matter of the claimed invention, and
- (5) citation of database search results listed in foreign languages where no copy was provided.

### **1. Reason for Citation of Large Number of References**

The reason that the Applicants submitted such a large number of references in the Information Disclosure Statements was that a large portion of the information cited by the Applicants was brought to the Applicants' attention in the discovery processes in a previous litigation in the United States District Court for the Eastern District of Virginia (*Personalized Mass Media Corp. v. The Weather Channel, Inc.* Docket No. 2:95 cv 242) and an investigation by the International Trade Commission (*In the Matter of Certain Digital Satellite System (DSS) Receivers And Components Thereof*, No. 337 TA 392, which was direct to U.S. Pat. No. 5,335,277) regarding claims in the Applicants' related issued patents. The documents listed in the Information Disclosure Statement were cited during the previous litigation/investigative proceedings by the alleged infringers in the aforementioned proceedings as being relevant and material to patentability of the claims in the related patents. The Applicants submitted those materials in the Information Disclosure Statement to the PTO at the earliest possible time in order to file them in compliance with the 3 month requirement stated in the certification used to submit the Information Disclosure Statement before the Office Action was issued as is necessary under 37 CFR § 1.97 (c) (1). In such haste, entries were inadvertently submitted which do not appear on their face to be material to the patentability of the present application. Applicants have corrected this error with the submission of the corrected Information Disclosure Statement as shown in Appendix B. However, it is the Applicants' understanding that not all references cited must be material to patentability in order for such references to be considered. In § 609 of the MPEP, it states,

“[t]hese individuals also may want the Office to consider information for a variety of reasons: e.g., without first determining whether the information meets any particular standard of materiality, or because another patent office considered the information to be relevant in a counterpart or related patent application filed in another country, or to make sure that the examiner has an opportunity to consider the same information that was considered by the individuals that were substantially involved in the preparation or prosecution of a patent application.”

Applicants' position is that information that was considered material in previous litigation would fall into the 'variety of reasons' category as stated above. Applicants intention was not to confuse or make difficult the examination process for the Examiner, but was instead to be forthright and open in disclosing all information deemed to be relevant to the application in issue by third parties.

## **2. Citations of Foreign Language References**

Applicants have re-examined the foreign references listed in all of the Information Disclosure Statements and have either eliminated such references from the list, included translations herewith or provided statements as to the relevancy of such references (APPENDIX A). The inclusion of translations with this response is in compliance with 37 C.F.R. § 1.97 (f) which states in part, “[I]f a bona fide attempt is made to comply with 37 C.F.R. § 1.98, but part of the required content is inadvertently omitted, additional time may be given to enable full compliance.” The omission of any translations and/or relevancy statements for foreign references were inadvertent and unintentional and are herein submitted in accordance with 37 C.F.R. § 1.97 (f).

## **3. References in the Information Disclosure Statements Subsequent to Applicants' Latest Effective Filing Date of 9/11/87**

Examiner stated “[n]umerous references listed in the IDS are subsequent to the applicant's latest effective filing date of 9/11/87, therefore, the relevancy of those references is unclear.” Upon further examination, the Applicants have eliminated those patents and publications after the effective filing date for the present application. It is the Applicants' understanding that the effective filing date for the present application is 9/11/87.

#### **4. Citation of Unrelated References**

Applicants appreciate the Examiner pointing out such references that were listed yet on their face appear to be unrelated to the subject matter of the present application. In response to such information, the Applicants have reviewed the cited references and removed any such references which appear to be unrelated on their face to the claimed subject matter such as the patent for a beehive, the patent for a chemical compound and numerous computer printout search results.

#### **5. Citation of Database Search Results**

Database search results listed in foreign languages where no copy was provided have been eliminated from the substitute Information Disclosure Statement included with this office action.

The Applicants offer the corrected Information Disclosure Statement (APPENDIX B) as a substitute to the previously filed Information Disclosure Statement filed 4/7/97. No new entries have been entered, only citations which have, upon further examination, been determined not to be relevant to the claimed subject matter have been eliminated, typographical errors have been corrected, dates inserted where possible and the list shortened as a result. It is the Applicants' intention that such corrected Information Disclosure Statement will help clarify any issues previously raised by the Examiner and aid in the prosecution of the present patent application.

### **D. Response to Rejections under 35 U.S.C. § 112**

#### **1. Specification Support of the Claims**

Paragraph 9 of the Office Action rejects claims 2-10 and 12-27 under 35 U.S.C. § 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventors, at the time the application was filed, had possession of the claimed invention. The Office Action specified essentially the following terms, financial analysis, the target processor and the digital television, of claims 3 and 26 as not being supported by the specification as originally filed.

The following tables list Applicants' claim language in the left column which corresponds to the specification support in the right column.

**a. Claim 3**

a target processor	Page 45 lines 22-24, page 46 line 2 with respect to page 451 line 9.
a user specific financial analysis	For example, page 555 lines 7-13, page 457 line 9 and lines 25-34 with respect to page 24 line 22 to page 25 line 6 and page 25 line 28 to page 26 line 16.

**b. Claim 26**

a digital television signal	Page 26 lines 4-11 with respect to page 25 line 2-6.
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**2. Conclusion**

Applicants respectfully submit that the claims of the subject application particularly point out and claim the subject matter sufficiently for one of ordinary skill in the art to comprehend the bounds of the claimed invention. The test for definiteness of a claim is whether one skilled in the art would understand the bounds of the patent claim when read in light of the specification, and if the claims so read reasonably apprise those skilled in the art of the scope of the invention, no more is required. *Credle v. Bond*, 25 F.3d 1556, 30 USPQ2d 1911 (Fed. Cir. 1994). The legal standard for definiteness is whether a claim reasonably apprises those of skill in the art of its scope. *In re Warmerdam*, 33 F.3d 1354, 31 USPQ2d 1754 (Fed. Cir. 1994). Applicants have amended the claims to enhance clarity and respectfully submit that all pending claims are fully enabled by the specification and distinctly indicate the metes and bounds of the claimed subject matter.

Applicants believe that the above recited changes are sufficient to overcome the rejections under 35 U.S.C. 112, first and second paragraph, and respectfully request withdrawal of these rejections. Applicants provide these specific embodiments in support of the pending claims by way of example only. The claims must be read as broadly as is reasonable in light of the specification, and Applicants in no way intend that their submission of excerpts/examples be construed to unnecessarily restrict the scope of the claimed subject matter.

**E. Response to Rejection of Claims for Absence of Novelty**

Applicants further respectfully submit that the claims in the present application should be allowed because these methods are not disclosed, taught, suggested, or implied by the applied prior art. For a prior art reference to anticipate in terms of 35 U.S.C. § 102, every element of the claimed invention must be identically shown in a single reference. *In re Bond*, 910 F.2d 831, 15 USPQ2d 1566 (Fed. Cir. 1990). There must be no difference between the claimed invention and the reference disclosure, as viewed by a person of ordinary skill in the field of the invention. *Scripps Clinic & Research Foundation v. Genetech, Inc.*, 927 F.2d 1565, 18 USPQ2d 1001, 18 USPQ2d 1896 (Fed. Cir. 1991). Absence from a cited reference of any element of a claim negates anticipation of that claim by the reference. *Kloster Speedsteel AB v Crucible, Inc.*, 230 USPQ 81 (Fed. Cir. 1986), *on rehearing*, 231 USPQ 160 (Fed. Cir. 1986).

**1. 35 U.S.C. § 102 (e) Rejection over Campbell**

Claim 2 stand rejected under 35 U.S.C. § 102 (e) as being anticipated by Campbell.

With respect to Applicants' claim 2, Campbell '791 fails to teach, *inter alia*, storing a subscriber datum at a computer at said receiver station, said subscriber datum being at least one of the group consisting of: a financial datum; an income datum; a preference profile datum; and an interest datum. The office action equates the tier and program enable codes of Campbell to Applicants claimed subscriber datum or financial analysis. Applicants respectfully disagree and submit that the tier and program enable codes of Campbell are simply disclosed as indicating the program tiers or levels which are available for viewing by the identified user. There is no teaching that the tier enable code 218 consists of any of the following: a financial datum; an income datum; a preference profile datum; and an interest datum. In fact, the tier enable code 218 which is stored at converter logic 104 is simply compared with another tier code 202 of channel control word 200 in order to determine if the user is enabled for the level of service of the television program.

Further, Campbell is silent as to generating a financial analysis by processing said stored subscriber datum in response to at least one of said detected and passed control signal and

outputting at least a portion of said financial analysis to a subscriber. As discussed, Campbell is silent as to subscriber datum that functions and is formulated as Applicants claim. In fact, Campbell is completely silent as to any datum that consists of a financial datum, an income datum, a preference profile datum, or an interest datum. In addition, the office action states that, "[t]he control signal [of Campbell] is extracted from the vertical interval." Although, Campbell does teach extracting data out of the vertical interval of the selected television signal. There is no teaching that the extracted data functions as Applicants' claimed control signal. In fact, Campbell uses the extracted data for comparisons in order to determine if the subscriber is enabled for the selected channel. Campbell is silent as to generating a financial analysis by processing said stored subscriber datum in response to at least one of said detected and passed control signal and outputting at least a portion of said financial analysis to a subscriber.

Applicants respectfully submit that the cited art does not anticipate claim 2 since the reference fails to disclose every element of the claimed invention, and Applicants respectfully request that the 35 U.S.C. § 102 (b) rejection of claim 2 be withdrawn.

#### **F. Response to Obviousness Rejection of Claims**

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art to modify the reference to combine the teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references combined) must teach or suggest all the claim recitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not based on Applicants' disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). MPEP 706.02(j).

##### **1. 35 U.S.C. § 103 (a) Rejection over Campbell**

Claims 3-10 and 12-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Campbell.

a. Claim 3

With respect to claim 3, Campbell fails to, *inter alia*, teach or suggest all the claim recitations, i.e., receiving at an origination transmitter station downloadable code effective at at least one of said plurality of receiver stations to generate a user specific financial analysis. The office action equates the tier and program enable codes of Campbell to Applicants claimed financial analysis. Applicants respectfully disagree and submit that the tier and program enable codes of Campbell are simply disclosed as indicating the program tiers or levels which are available for viewing by the identified user. There is no teaching that the tier enable code 218 are equivalent to Applicants financial analysis. Further, Applicants agree with the office actions assertion that Campbell does not teach downloadable code.

Further, Campbell is silent as to at least one control signal operates to execute said downloadable code at said at least one of said plurality of receiver stations. Clearly, Campbell is silent as to any downloadable code. Therefore, Applicants submit that Campbell is also silent as to any control signal [that] operates to execute said downloadable code at said at least one of said plurality of receiver stations.

Campbell is silent as to Applicants claimed downloadable code, financial analysis, and control signal. Therefore, Campbell '791 fails to suggest or describe any of the following: transferring said downloadable code from said origination transmitter station to an origination station transmitter; transferring said at least one control signal from said origination transmitter station to said origination station transmitter; and transmitting an information transmission comprising said downloadable code and said at least one control signal to said at least one of said plurality of receiver stations.

The office action introduces Hedger to allegedly teach Applicants' claimed downloadable code. Applicants submit that even if Hedger did teach code, Campbell '791 still lacks the teaching of each and every one of Applicants' claimed limitations. Further, Applicants submit that Hedger is silent as to receiving at an origination transmitter station downloadable code



effective at at least one of said plurality of receiver stations to generate a user specific financial analysis. Hedger is completely silent as to any code that functions as Applicants claim.

Applicants submit that Campbell, alone or in combination with Hedger, fails to suggest or describe Applicants' claimed invention.

**b. Claim 7**

With respect to claim 7, Campbell, alone or in combination with Hedger, fails to, *inter alia*, teach or suggest all the claim recitations, i.e., at least one instruct signal being effective at said receiver station to generate a user specific financial analysis. The office action equates the tier and program enable codes of Campbell to Applicants claimed financial analysis. Applicants respectfully disagree and submit that the tier and program enable codes of Campbell are simply disclosed as indicating the program tiers or levels which are available for viewing by the identified user. There is no teaching that the tier enable code 218 is equivalent to Applicants financial analysis. Further, Campbell is silent as to any instruct signal that generates the tier code. In fact, the tier code is generated as part of the channel control word 200, by PCS 50 in order to define the codes required for access to each transmitted television program. There is no mention of any instruct signal that is effective at said receiver station to generate a user specific financial analysis.

Further, Campbell, alone or in combination with Hedger, is silent as to at least one control signal which at the remote intermediate transmitter station operates to control the communication of said at least one instruct signal. Clearly, there is no suggestion in Campbell of any instruct signal that functions as Applicants claim. Therefore, there is no teaching or a need for any control that functions to communicate the instruct signal, wherein the instruct signal is effective at said receiver station to generate a user specific financial analysis.

The office action rejections claim 7 over Campbell in view of Hedger. However, the office action has failed to state how Hedger is used to modify Campbell to teach the claim language of claim 7. Therefore, in light of the above arguments, Campbell, alone or in combination with Hedger, fails to suggest or describe Applicants' claimed invention. Further,

since there is no teaching of any instruct signal or control signal that functions as Applicants claim. There is also no teaching of transmitting said at least one control signal to said at least one origination transmitter for transmission to said at least one receiver station before a specific time, by either Campbell '791 or Hedger. Applicants submit that Campbell, alone or in combination with Hedger, fails to suggest or describe Applicants' claimed invention.

**c. Claim 10**

With respect to claim 10, Campbell, alone or in combination with Hedger, fails to, *inter alia*, teach or suggest all the claim recitations, i.e., receiving a first instruct signal effective to instruct a processor to generate a user specific financial analysis. The office action equates the tier and program enable codes of Campbell to Applicants claimed financial analysis. Applicants respectfully disagree and submit that the tier and program enable codes of Campbell are simply disclosed as indicating the program tiers or levels which are available for viewing by the identified user. There is no teaching that the tier enable code 218 is equivalent to Applicants financial analysis. Further, Campbell is silent as to any first instruct signal that generates the tier code. In fact, the tier code is generated as part of the channel control word 200, by PCS 50 in order to define the codes required for access to each transmitted television program. There is no mention of any first instruct signal that is effective at said receiver station to generate a user specific financial analysis.

Further, since Campbell, alone or in combination with Hedger, fails to teach any first instruct signal that functions as Applicants claim. Clearly, there is no teaching of selecting one of: a time at which to communicate said first instruct signal; and a location to which to communicate said first instruct signal.

The office action rejections claim 10 over Campbell in view of Hedger. However, the office action has failed to state how Hedger is used to modify Campbell to teach the claim language of claim 10. Therefore, in light of the above arguments, Campbell, alone or in combination with Hedger, fails to suggest or describe Applicants claimed invention. Further, since there is no teaching of any instruct signal or control signal that functions as Applicants

claim. There is also no teaching of communicating said first instruct signal at one of said selected time and to said selected location and storing said television signal and said first instruct signal at said storage device, by either Campbell '791 or Hedger. Applicants submit that Campbell, alone or in combination with Hedger, fails to suggest or describe Applicants' claimed invention.

**d. Claim 15**

With respect to claim 15, Campbell fails to, *inter alia*, teach or suggest all the claim recitations, i.e., generating, in said network, a user specific financial analysis which is to be output at said interactive mass medium program output apparatus, said interactive mass medium program output apparatus having a receiver for receiving at least a portion of said user specific financial analysis from said remote station. The office action equates the tier and program enable codes of Campbell to Applicants claimed financial analysis. Applicants respectfully disagree and submit that the tier and program enable codes of Campbell are simply disclosed as indicating the program tiers or levels which are available for viewing by the identified user. There is no teaching that the tier enable code 218 is equivalent to Applicants financial analysis. In fact, the tier code is generated as part of the channel control word 200, by PCS 50 in order to define the codes required for access to each transmitted television program. Campbell, alone or in combination with Hedger, is silent as to any generated a user specific financial analysis.

The office action rejections claim 15 over Campbell in view of Hedger. However, the office action has failed to state how Hedger is used to modify Campbell to teach the claim language of claim 15. Therefore, in light of the above arguments, Campbell, alone or in combination with Hedger, fails to suggest or describe Applicants claimed invention. Further, since there is no teaching of any financial analysis that functions or is formulated as Applicants claim. There is also no teaching of delivering specific combined medium programming at said output device on the basis of said user specific financial analysis, by either Campbell '791 or Hedger. Applicants submit that Campbell, alone or in combination with Hedger, fails to suggest or describe Applicants' claimed invention.

Claims 4-6, 8, 9, 11-14, and 16-27 depend upon any one of independent claims 3, 7, 10, and 15. As discussed *supra*, Campbell fails to disclose every element of claims 3, 7, 10, and 15 and thus, *ipso facto*, Campbell fails to anticipate dependent claims 4-6, 8, 9, 11-14, and 16-27, and therefore, this rejection should be withdrawn and the claim be permitted to issue. If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988).

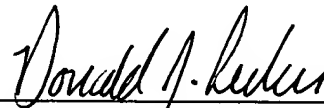
Applicants respectfully request that the 35 U.S.C. §103(a) rejection of claims 3-10 and 12-27 be withdrawn.

### III. CONCLUSION

In accordance with the foregoing it is respectfully submitted that all outstanding objections and rejections have been overcome and/or rendered moot. Further, all pending claims are patentably distinguishable over the prior art of record, taken in any proper combination. Thus, there being no further outstanding objections or rejections, the application is submitted as being in a condition for allowance, which action is earnestly solicited.

If the Examiner has any remaining informalities to be addressed, it is believed that prosecution can be expedited by the Examiner contacting the undersigned attorney for a telephone interview to discuss resolution of such informalities.

Respectfully submitted,



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## **APPENDIX A**

The following foreign reference has been cited by Applicants in the Information disclosure Statements filed 12-22-95, 2-6-96, and 4-7-97. Applicants have further included the following relevancy statement as well as an English abstract (in the case of foreign patents), thus meeting the requirements as set forth in 37 CFR 1.98 and MPEP § 609.

### **For the Information Disclosure Statement filed 12-22-95:**

**23 38 330      February 13, 1975      Germany**

This reference discloses television receivers that transmit control signals to a decoder/processor combination.

### **For the Information Disclosure Statement filed 2-6-96:**

**61-050470      March 12, 1986      Japan**

This reference discloses a program engagement device that displays the program content at a television receiver and includes a display output control device.

**60-61935      April 9, 1985      Japan**

This reference discloses a system that generates, detects, communicates, and/or converts digital signals.

### **For the Information Disclosure Statement filed 4-7-97:**

**0 020 242      December 10, 1980      European**

This reference discloses a teletext character alignment process.

**0 046 108      February 17, 1982      European**

This reference discloses a integrated circuit interface between a television receiver and recorder.

**0 049 184      April 7, 1982      European**

This reference discloses a pocket teaching aid using a television receiver with a teletext system.

**0 055 167      June 30, 1982      European**

This reference discloses a teletext CRT display for messages from a composite memory.

**0 077 712      April 27, 1983      European**

This reference discloses a multi-channel digital packet television broadcasting system.

**0 078 185      May 4, 1983      European**

This reference discloses a digital packet broadcasting system using television transmissions.

**2 496 376      June 18, 1982      France**

This reference discloses a teletext display of data on the television screen.

**2 516 733      May 5, 1983      France**

This reference discloses an error controller for a teletext television decoder.

**2 823 175      November 29, 1989      Germany**

This reference discloses a teletext information display for television transmission.

**24 53 441      May 13, 1976                      Germany**

This reference discloses a wideband signal transmission with digital to image signal conversion.

**DE 30339949   May 6, 1982                      Germany**

This reference discloses a method for the generation of teletext display having a color character contrast.

**DE 3112249    October 7, 1982                      Germany**

This reference discloses a processing signals from either a colored television receiver or from a video text decoder.

**DE 3020787    December 17, 1981                      Germany**

This reference discloses a television transmission system that sends extra data during a blanking period.

**WO 80/00292    February 21, 1980   Japan**

This reference discloses a decoder for a television receiver that has a color component that splits signals and recombines the signals into a composite drive current signal.

**WO 83/00789   March 3, 1983                      Japan**

This reference discloses an image display unit which displays received image signals via a memory, wherein the image signals include teletext displays of weather reports or television programs.



**Graf, P.H., "Antiope-Uebertragung fuer Breitbandige Videotex-Verteildienste," 1981.**

This reference shows an Antiope demodulator/detector.

**Heller, Arthur, "VPS - Ein Neues System Zuragsgesteuerten Programmanfzeichnung, Rundfunk technisde Mitteilungen, pp. 162-169.**

This reference discloses a decoding system for use with a VCR.

**Marti, B et al., Discrete, service de television cryptee, Revue de radiodiffusion - television (1975), pp. 24-30.**

This reference discloses an analog decryption system.

**Strauch, D., "(Las Media De Telecommunication Devant la Rapture. Les Nonvellas Methodes Presentees a L'Eposition International 1979 de Radio (Et Television)) 1979.**

This reference is a discussion of videotext, teletext, ceefax, oracle, and antiope.

## **APPENDIX B**

**INFORMATION DISCLOSURE  
STATEMENT BY APPLICANT**

**CITATION FORM**

Attorney Docket No.

05634.0318

Serial No.

08/487,411

Applicant(s)

John C. Harvey and James W. Cuddihy

Filing Date

June 7, 1995

Group Art Unit

2732

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	2,563,448	August 7, 1951	Aram	178/5.1	
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	3,133,986	May 19, 1964	Morris et al.	178/5.1	
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	3,651,261	March 21, 1972	Guanella	178/22	
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